FEDERATION REPORTS.

AHMAD BIN HASHIM v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Pretheroe and Spenser-Wilkinson, JJ.) December 9, 1949]

[F.M. — Criminal Appeal Nos. 4 and 5 of 1949]

Criminal Procedure Code S. 158(f) — Alteration of charge after opinions of Assessors have been expressed — Illegality — Effect on conviction on other charges — Emergency Regulations, 1948.

In this case the appellant was charged (i) with being in possession of a revolver, an offence contrary to Regulation 4(1)(a) of the Emergency Regulations, 1948, and (ii) with being in possession of fifteen rounds of .38 ammunition and a hand grenade, an offence contrary to Regulation 4(1)(b) of the said Regulations. After the learned trial Judge had completed his summing up, both Assessors expressed their opinions that the appellant was guilty on the first charge. As regards the second charge one Assessor expressed his opinion that the appellant was not guilty in respect of the ammunition; the other Assessor expressed his opinion that the appellant was guilty in respect of the ammunition and stated that as regards the hand grenade his opinion was neutral. Thereupon the learned trial Judge amended the second charge by deleting all reference to the hand grenade and took the opinions of both Assessors on the amended second charge. On this amended charge the first Assessor expressed the opinion of not guilty and the second the opinion of guilty. The learned trial Judge agreed with the second Assessor and convicted the appellant on the second charge as amended. On appeal, it was argued that the alteration of the charge after the opinions of the Assessors had been expressed was illegal and that since this illegality had occurred the whole trial, including the conviction on the first charge, was void.

Held, (1) that the amendment of the second charge in this case was in direct contravention of Section 158 of the Criminal Procedure Code and this amounts to an illegality which cannot be cured; (2) that the opinions of the Assessors expressed after that illegality had occurred were null and void, as also the purported conviction by the learned trial Judge and that the conviction and sentence on the second charge should be set aside; and (3) that as no injustice was caused to the appellant in the proceedings relating to the first charge, there were no grounds for interfering with the conviction on that charge.

Cases referred to :—

(1) *Subramania Iyer v. King-Emperor* L.R. 28 I.A. 257.

(2) *Abdul Rahman v. King-Emperor* L.R. 54 I.A. 96.

COURT OF APPEAL.

C. Mills for the Appellant.
Tunku Abdul Rahman (D.P.P.)
N. L. Cohen for the Respondent.

The judgment of the Court of Appeal was delivered by :—

Willan, C. J. : — In this case the appellant was charged as follows :—

(1) being in possession of a revolver — an offence contrary to Regulation 4(1)(a) of the Emergency Regulations, 1948;

(2) being in possession of fifteen rounds of .38 ammunition and a hand grenade — an offence contrary to Regulation 4(1)(b) of the said Regulations.

After the learned trial Judge had completed his summing up both Assessors expressed their opinions that the appellant was guilty on the first charge. As regards the second charge one Assessor expressed his opinion that the appellant was not guilty in respect of the ammunition; the other Assessor expressed his opinion that the appellant was guilty in respect of the ammunition and stated that as regards the hand grenade his opinion was neutral.

Thereupon the learned trial Judge amended the second charge by deleting all reference to the hand grenade, and took the opinions of both Assessors on the amended second charge relating to the fifteen rounds of ammunition only. On this amended charge the first Assessor expressed the opinion of not guilty and the second the opinion of guilty. The learned trial Judge agreed with the second Assessor and convicted the appellant on the second charge as amended.

Mr. Mills, for the appellant, did not go into the evidence — his written grounds of appeal as filed are :—

(a) That the amendment of the second charge was illegal in that it was made after the opinions of the Assessors had been given.

(b) That the learned trial Judge was wrong in law in asking the Assessors to reconsider their opinions on the second charge.

Sub-section (i) of section 158 of the Criminal Procedure Code reads :—

> Any Court may alter or add to any charge at any time before judgment is pronounced or in the case of trials by jury or trials with the aid of Assessors before the verdict of the jury is returned or the opinions of the assessors are expressed.

Hence, clearly Mr. Mills is correct that the alteration of the second charge, after the opinions of the Assessors had been taken thereon, is contrary to that section and constitutes an illegality in the trial.

That being so, Mr. Mills argued that since an illegality had occurred, the whole trial, including the conviction on the first charge, is void and that there must be a re-trial. In support of this argument he cited the case of *Subramania Iyer v. King-Emperor*[1]. In that case Subramania Iyer was tried on charges of extortion, in which 41 criminal acts extending over a period of two years were brought against him, in contravention of a section of the Indian Criminal Procedure Code which provides that a man can only

be tried for three offences, and those committed within a period of twelve months. In that case Their Lordships of the Privy Council said, at page 263 :—

> "Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one indictment."

From the report of the *Subramania Iyer* case it is clear that Their Lordships of the Privy Council quashed the conviction not simply because there had been an illegality, but because that illegality was one which caused embarrassment to the accused consequent on being faced by a multitude of charges. This is clear from that part of the report at pages 262 and 263, which reads :—

> "In this case the appellant was tried on an indictment in which he was charged with no less than forty-one acts, these acts extending over a period of two years. This was plainly in contravention of Criminal Procedure, s. 234, which provides that a person may only be tried for three offences of the same kind if committed within a period of twelve months. The reason of such provision, which is analagous to our own provision in respect of embezzlement, is obviously in order that the jury may not be prejudiced by the multitude of charges and the inconvenience of hearing together of such a number of instances of culpability, and the consequent embarrassment both to judges and accused. It is likely to cause confusion and to interfere with the definite proof of a distinct offence, which it is the object of all criminal procedure to obtain."

The case of Subramania Iyer was referred to and explained by Their Lordships of the Privy Council in the later case of *Abdul Rahman v. King-Emperor*(2). At page 109 of the report of that case Their Lordships said :—

> "The distinction between that case" (i.e. the case of Subramania Iyer) "and the present is fairly obvious. The procedure adopted was one which the Code positively prohibited, and it was possible that it might have worked actual injustice to the accused."

Further, at page 110, there appears the following passage :—

> "To sum up, in the view which their Lordships take of the several sections of the Code of Criminal Procedure, the bare fact of such an omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction ....."

In the case before us the amendment of the second charge was in direct contravention of section 158 of the Criminal Procedure Code and this amounts to an illegality which cannot be cured because the opinions of the Assessors, expressed after that illegality had occurred, are null and void, as also is the purported conviction by the learned trial Judge.

But, we are unable to agree with Mr. Mills that because of this the conviction on the first charge cannot stand. No injustice was caused to the appellant in the proceedings relating to the first charge, even though in the same trial, on account of the illegality committed in respect of the second charge. Mr. Mills did not allege or suggest that there had been any failure of justice as regards the conviction on the first charge, and in our opinion there was no such failure.

Accordingly, in the light of the case of *Abdul Rahman v. King-Emperor supra* and because the decision in *Subramania Iyer's* case was based on the fact that, in the special circumstances of that case, there was embarrassment to the accused, we see no grounds for interfering with the conviction on the first charge. The appeal as regards that conviction is dismissed.

Since the conviction on the first charge stands, there is no reason to order a re-trial on the second charge. It is sufficient to formally set aside the conviction and sentence on the second charge and this we do.

Conviction on 1st Charge upheld.
Conviction on 2nd Charge set aside.